

Office of Chief Counsel  
Internal Revenue Service

**memorandum**

CC:LM:CTM:LN:TL-N-1279-01

JMMarr

date: APR 30 2001

to: Jeffrey M. Galante, Appeals Team Manager  
Jon B. Hales, Appeals Officer

from: Joyce M. Marr, Attorney (LMSB)  
June Y. Bass, Associate Area Counsel (LMSB)

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subject: [REDACTED] (formerly known as [REDACTED])  
EIN: [REDACTED]  
Advisory Opinion on Proper Entity to Execute Documents Following  
Merger of [REDACTED] into [REDACTED]  
Income Tax Years: [REDACTED], [REDACTED], and [REDACTED]  
Statute of Limitations: [REDACTED]

DISCLOSURE STATEMENT

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

This is in response to your request for advice received on February 26, 2001, as to the proper caption to use on: (1) Forms 870-AD (Offers to Waive Restrictions on Assessment and Collection of Tax Deficiency and to Accept Overassessment) to be secured for the tax years ended [REDACTED], [REDACTED], and [REDACTED]; (2) Forms 2297 (Waiver of Statutory Notification of Claim Disallowance) for the tax years ended [REDACTED], [REDACTED], and [REDACTED]; and (3) Forms 872 (Consents to Extend the Time to Assess Tax) to extend the statute of limitations for the tax years ended [REDACTED], [REDACTED], and [REDACTED].  
This memorandum should not be cited as precedent.

Issues

1. Who is the proper party to execute Forms 870-AD for the former [REDACTED], formerly known as [REDACTED] consolidated group for taxable years [REDACTED], [REDACTED], and [REDACTED]?
2. Who is the proper party to execute Forms 2297 for the former [REDACTED], formerly known as [REDACTED] and [REDACTED]?

[REDACTED] consolidated group for its tax years ended [REDACTED], [REDACTED], and [REDACTED]?

3. What is the proper language to use on the Form 872 for the [REDACTED], formerly known as [REDACTED] consolidated group for its tax years ended [REDACTED], [REDACTED], and [REDACTED]?

### Conclusions

1. When [REDACTED] merged into [REDACTED] under New York State law, [REDACTED] succeeded to the several liability of [REDACTED] for the consolidated tax liability of the [REDACTED] consolidated group for the tax years [REDACTED] through [REDACTED], inclusive. Because [REDACTED] was severally liable for the consolidated tax liability of the [REDACTED] consolidated group for the tax years [REDACTED] through [REDACTED], inclusive, it was liable for all of the tax liability of the group for the tax years [REDACTED] through [REDACTED], inclusive. Therefore, we recommend you obtain Form 870-AD from [REDACTED], as the successor to [REDACTED]. The Form 870-AD should be captioned as follows:

[REDACTED]), as  
successor to [REDACTED]  
[REDACTED]) (formerly known as [REDACTED])

Put an asterisk after the caption and at the bottom of the Form 870-AD, type "\*This is with respect to the several liability of [REDACTED] (formerly known as [REDACTED] for the consolidated tax of [REDACTED] [REDACTED] (formerly known as [REDACTED]) consolidated group for the tax years ended [REDACTED], [REDACTED], and [REDACTED]."

2. When [REDACTED] merged into [REDACTED] under New York State law, [REDACTED] succeeded to the assets of [REDACTED]. One of these assets was the right of [REDACTED] (as common parent) to file a refund claim on behalf of each member of the [REDACTED] group. Therefore, you should obtain Form 2297 from [REDACTED] as successor to [REDACTED] the former common parent

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<sup>1</sup> The EIN which we have set forth is the EIN shown on [REDACTED]'s Form 8-K dated [REDACTED], which we downloaded from LEXIS. When preparing the Form 870-AD, please verify that this is the EIN for [REDACTED] according to the Service's records.

of the [REDACTED] group. The Form 2297 should be captioned as follows:

[REDACTED]<sup>2</sup>), as  
successor to [REDACTED]  
[REDACTED] (formerly known as [REDACTED]).

Put an asterisk after the caption and at the bottom of the Form 2297, state: "\*This is with respect to the claim(s) filed on behalf of the [REDACTED] formerly known as [REDACTED] consolidated group for credit or refund as shown in column (c), above."

3. When [REDACTED] merged into [REDACTED] under New York State law, [REDACTED] succeeded to the several liability of [REDACTED] for the consolidated tax liability of the [REDACTED] consolidated group for the tax years [REDACTED] through [REDACTED] inclusive. Therefore, [REDACTED] is the proper party to sign the Form 872 for the consolidated tax liability of the [REDACTED] consolidated group for the tax years [REDACTED] through [REDACTED] inclusive. [REDACTED] will be liable for any tax owed. The proper caption to use on the Form 872 is as follows: "[REDACTED]<sup>3</sup>), as successor in interest to [REDACTED] (formerly known as [REDACTED])." Put an asterisk immediately thereafter. At the bottom of the page, the following language should be added (including the asterisk):

\* This is with respect to the consolidated tax liability of the [REDACTED] (formerly known as [REDACTED] consolidated return group for the taxable years ended [REDACTED], [REDACTED], and [REDACTED].

The Forms 872, 870-AD, and 2297 should be signed by a current officer of [REDACTED]. Under the officer's name, you should type in his or her title and the name "[REDACTED]."

Since the requirements of I.R.C. § 6501(c)(4)(B), pertaining to giving the taxpayer notification of certain rights, must be satisfied, please ensure that the statute extension is requested

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<sup>2</sup> See supra note 1.

<sup>3</sup> See supra note 1.

by the most recent revision of Form Letter 907 or 967.

Facts

[REDACTED], which was the common parent of the [REDACTED] consolidated group, filed consolidated income tax returns for the fiscal year ended [REDACTED] and its taxable year ended [REDACTED]. On its Affiliation Schedules (Forms 851) for such returns, [REDACTED] listed two subsidiaries: [REDACTED] and [REDACTED].

According to information retrieved from the LEXIS CABIZ file, on [REDACTED], [REDACTED] underwent a name change to [REDACTED]. It filed a consolidated return for the taxable year ended [REDACTED], on which "[REDACTED] (Formerly [REDACTED])" was inserted in the space for "Name." The same two subsidiaries were listed on the the Form 851 for such return as on the Form 851 for the tax year ended [REDACTED], namely, [REDACTED] and [REDACTED].

[REDACTED] filed a consolidated return for the taxable year ended [REDACTED]. The same two subsidiaries were listed on the [REDACTED] return as were previously listed on the returns for [REDACTED] and [REDACTED].

As of [REDACTED], [REDACTED] entered into an Agreement and Plan of Merger (the Merger Agreement) with [REDACTED], a corporation organized under the laws of Germany, and [REDACTED], a Delaware corporation and an indirect wholly owned subsidiary of [REDACTED].<sup>4</sup>

The Merger Agreement provides that: (1) [REDACTED] shall cause [REDACTED] to offer to purchase all outstanding common stock, no par value, of [REDACTED] through a tender offer at a price of \$ [REDACTED] per share, net to the seller in cash; and (2) [REDACTED] would merge into [REDACTED], with the separate corporate existence of [REDACTED] ceasing and [REDACTED] continuing its existence under the laws of the State of California as the surviving corporation.

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<sup>4</sup> According to information obtained from the LEXIS COMPANY file, at the time in question, [REDACTED] was a wholly owned subsidiary of [REDACTED], the [REDACTED] company in Germany.

According to information obtained from LEXIS, at midnight (EDT) on [REDACTED], [REDACTED] successfully completed its tender offer for all outstanding common shares of [REDACTED] and based on a preliminary count, [REDACTED] shares of [REDACTED] common stock were tendered and accepted for payment in accordance with the terms of the offer, resulting in [REDACTED] and its subsidiaries owning approximately [REDACTED]% of the shares of [REDACTED]'s outstanding common stock.

By virtue of the merger of [REDACTED] and [REDACTED], each share of [REDACTED]'s common stock owned by [REDACTED], any subsidiary of [REDACTED], [REDACTED], or any subsidiary of [REDACTED] was canceled and ceased to exist. In addition, each remaining share of [REDACTED] common stock was converted into the right to receive \$ [REDACTED] in cash, without interest. The merger was effective on [REDACTED]. By virtue of this merger, [REDACTED] became a wholly-owned subsidiary of [REDACTED]'s parent corporation, [REDACTED] ([REDACTED]), a Delaware corporation, which was a wholly-owned subsidiary of [REDACTED]. [REDACTED] held in safekeeping Certificate # [REDACTED] for [REDACTED] shares of its common stock registered in the name of [REDACTED].

[REDACTED] filed a consolidated income tax return for the short period beginning on [REDACTED] and ending on [REDACTED]. On this short-period return, [REDACTED] stated that it was incorporated on [REDACTED]. Thus, this was the initial return filed by [REDACTED].

[REDACTED] included [REDACTED] on the Affiliations Schedule (Form 851) for the consolidated return it filed for the short period ended [REDACTED]. [REDACTED] also included [REDACTED] on the Affiliations Schedule for a short-period return filed by it for the tax year beginning [REDACTED], and ending [REDACTED].

[REDACTED] was an indirect subsidiary of [REDACTED], a German corporation which is the ultimate parent of a large multinational group of companies. On [REDACTED], as part of an internal reorganization of the [REDACTED] group corporate structure, all of the shares of [REDACTED] were transferred to [REDACTED], a Delaware corporation.

On the Affiliations Schedule for [REDACTED]'s [REDACTED] consolidated income tax return, [REDACTED] included the

following corporations: [REDACTED]  
[REDACTED] and [REDACTED]. Affixed hereto as Exhibit A is an organizational chart showing that as of [REDACTED]: (1) [REDACTED]'s parent corporation was [REDACTED]; and (2) [REDACTED]'s parent corporation was [REDACTED] a Delaware corporation, a first tier subsidiary of [REDACTED].

On [REDACTED], a consortium consisting of [REDACTED], an affiliate of [REDACTED], and another distributor of electronics entered into a share purchase agreement to purchase the [REDACTED] for \$[REDACTED] in cash. See [REDACTED]'s Form 8-K dated [REDACTED] which is affixed hereto as Exhibit B. The share purchase agreement provided that "[s]ubject to the terms and conditions set forth herein, . . . [REDACTED] hereby sells to [REDACTED] ...all the shares in issue in [REDACTED]...." See Paragraph 1.1(a)(v) of Article 1 of the Share Purchase Agreement which is affixed hereto as Exhibit C.<sup>5</sup>

Effective [REDACTED], after [REDACTED] had purchased the shares of [REDACTED], [REDACTED] and two other corporations<sup>6</sup> were merged with and into [REDACTED]. The merger was consummated pursuant to Section 905 of the Business Corporation Law of the State of New York and [REDACTED] "assum[ed] all of the liabilities and obligations" of the constituent entities. As a result of this merger [REDACTED] owned all the outstanding shares of [REDACTED].

Effective [REDACTED], pursuant to Section 905 of the Business Corporation Law of the State of New York, [REDACTED] was merged with and into [REDACTED]. Affixed hereto as Exhibit D is a copy of the relevant "Certificate of Merger."

According to information we have retrieved from LEXIS, which is affixed hereto as Exhibit E, [REDACTED] and [REDACTED]

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<sup>5</sup> Section 4 of the Recitals in the Share Purchase Agreement states that [REDACTED] "owns and will immediately prior to Closing own ... [REDACTED] fully paid shares and constituting all of the issued shares, free and clear of any encumbrance, in [REDACTED]...."

<sup>6</sup>The two other corporations were [REDACTED] and [REDACTED]

[REDACTED], i.e., the two subsidiaries included on the consolidated returns of [REDACTED] for the tax years [REDACTED], [REDACTED], [REDACTED], and [REDACTED], were merged with and into [REDACTED] on [REDACTED]. Also affixed hereto as Exhibit F is information retrieved from the California Secretary of State website which confirms that these two subsidiaries were merged out of existence.

The statute of limitations on assessment against the [REDACTED] consolidated group for the tax years [REDACTED], [REDACTED] and [REDACTED] has previously been extended until [REDACTED].

Appeals has considered refund claims filed by the [REDACTED] consolidated group for the tax years [REDACTED], [REDACTED] and [REDACTED]. Appeals plans to disallow part of the claims and solicit a Form 2297 (Waiver of Statutory Notice of Claim Disallowance) with respect to these refund claims.

#### Discussion

In general, the common parent corporation and each subsidiary which was a member of a consolidated group during any part of the consolidated return year is severally liable for the tax of the group for such year (i.e., is responsible for the tax of the entire group, not simply its proportionate share). Treas. Reg. § 1.1502-6(a).

Generally, the common parent is the sole agent for each member of the group, duly authorized to act in its own name in all matters relating to the tax liability for the consolidated return year. Treas. Reg. § 1.1502-77(a). The common parent will file any claim(s) for refund, and any refund is to be made directly to and in the name of the common parent and will discharge any liability of the Government in respect thereof to any subsidiary. Id.

#### Forms 870-AD

Since [REDACTED], [REDACTED], [REDACTED], and [REDACTED] were members of the [REDACTED] consolidated group for the tax years [REDACTED], [REDACTED], and [REDACTED], they each were severally liable under Treas. Reg. § 1.1502-6(a) for the [REDACTED] consolidated group's tax for the tax years [REDACTED], [REDACTED], and [REDACTED].

Section 906(b)(3) of the Business Corporation Law of the State of New York provides, in pertinent, that when a merger is effected, "[t]he surviving ... corporation shall assume and be

liable for all the liabilities, obligations and penalties of each of the constituent entities." Thus, under New York law, [REDACTED], as the successor to [REDACTED] and as a successor to the successor to [REDACTED] and [REDACTED], is liable for the several tax liabilities of [REDACTED], and [REDACTED].

Since [REDACTED] was severally liable for the consolidated tax liability of the [REDACTED] consolidated group for the tax years [REDACTED] through [REDACTED], inclusive, it was liable for all of the tax liability of the group for the tax years in question. Therefore, the Service should obtain Form 870-AD from [REDACTED] as a successor to [REDACTED]. There is no need for [REDACTED] to sign any other Form 870-AD with regard to any of the other former subsidiaries of the [REDACTED] group. The Form 870-AD you obtain from [REDACTED] should be captioned as follows:

[REDACTED]), as  
successor to [REDACTED]  
[REDACTED] (formerly known as [REDACTED])

Put an asterisk after the caption and at the bottom of the Form 870-AD, type "\*This is with respect to the several liability of [REDACTED] (formerly known as [REDACTED] for the consolidated tax of [REDACTED] [REDACTED] (formerly known as [REDACTED]) [REDACTED] consolidated group for the tax years ended [REDACTED], [REDACTED], and [REDACTED]."

The Form 870-AD should be executed by an authorized officer of [REDACTED], analogous to the procedure set forth in Rev. Rul. 83-41, 1983-1 C.B. 399, clarified and amplified, Rev. Rul 84-165, 1984-2 C.B. 305 (the Service will apply the rules applicable to the execution of original returns to the execution of consents to extend the time to make an assessment). Under the officer's name, you should type in his or her title and the name [REDACTED].

#### Forms 2297

If a taxpayer waives a notice of disallowance with respect to its claim for refund by executing Form 2297, the two-year period for instituting a suit for refund begins to run on the

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<sup>7</sup> See supra note 1.



date such waiver is filed. I.R.C. § 6532(a)(3).

As noted above, in general, the common parent must file all claims for refund on behalf of each member of the consolidated group. Treas. Reg. § 1.1502-77(a). Furthermore, any refund is to be made directly to and in the name of the common parent and will discharge the liability, if any, of the government in respect thereof to any member of the consolidated group. Id.

When [REDACTED] merged into [REDACTED] under New York State law, [REDACTED] succeeded to the assets of [REDACTED]. One of these assets was the right of [REDACTED] (as common parent) to file a refund claim on behalf of each member of the [REDACTED] consolidated group. Hence, the Service should obtain Form 2297 from [REDACTED] as a successor to [REDACTED] with the following language:

[REDACTED]<sup>8</sup>), as  
successor to [REDACTED]  
[REDACTED] (formerly known as [REDACTED]).

Put an asterisk after this language and at the bottom of the Form 2297, state: "\*This is with respect to the claim(s) filed on behalf of the [REDACTED] (formerly known as [REDACTED] consolidated group for credit or refund as shown in column (c), above."

All Forms 2297 should be executed by an authorized officer of [REDACTED], analogous to the procedure set forth in Rev. Rul. 83-41, 1983-1 C.B. 399, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305. Under the officer's name, you should type in his or her title and the name [REDACTED].

#### Form 872

As previously mentioned, Section 906(b)(3) of the Business Corporation Law of the State of New York provides, in pertinent, that when a merger is effected, "[t]he surviving ... corporation shall assume and be liable for all the liabilities, obligations and penalties of each of the constituent entities." Thus, under New York law, [REDACTED] succeeded to the several liability of [REDACTED] for the consolidated tax liability of [REDACTED] consolidated group for the tax years [REDACTED] through [REDACTED], inclusive, and is liable for this liability. Thus,

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<sup>8</sup> See supra note 1.

[REDACTED] is the proper party to sign the Form 872 for the consolidated tax liability of the [REDACTED] consolidated group for the tax years [REDACTED] through [REDACTED], inclusive.

The caption on the Form 872 should read as follows:

[REDACTED] as successor  
in interest to [REDACTED]  
[REDACTED] (formerly known as [REDACTED]) \*

Then at the bottom of the page, you should put the following:

\*This is with respect to the consolidated tax liability of the [REDACTED] (formerly known as [REDACTED]) [REDACTED] consolidated return group for the taxable years ended [REDACTED], [REDACTED], and [REDACTED]

The Form 872 should be signed by a current officer of [REDACTED]  
[REDACTED] Under the officer's name, you should type his  
or her title and the name [REDACTED]

This advice has been coordinated with the Office of Chief Counsel. With the rendition of this advice, we are closing our file. Please contact the undersigned at telephone number (949) 360-2688 if you have any questions or comments concerning the foregoing.

JOYCE M. MARR  
Attorney (LMSB)

Attachments: As stated